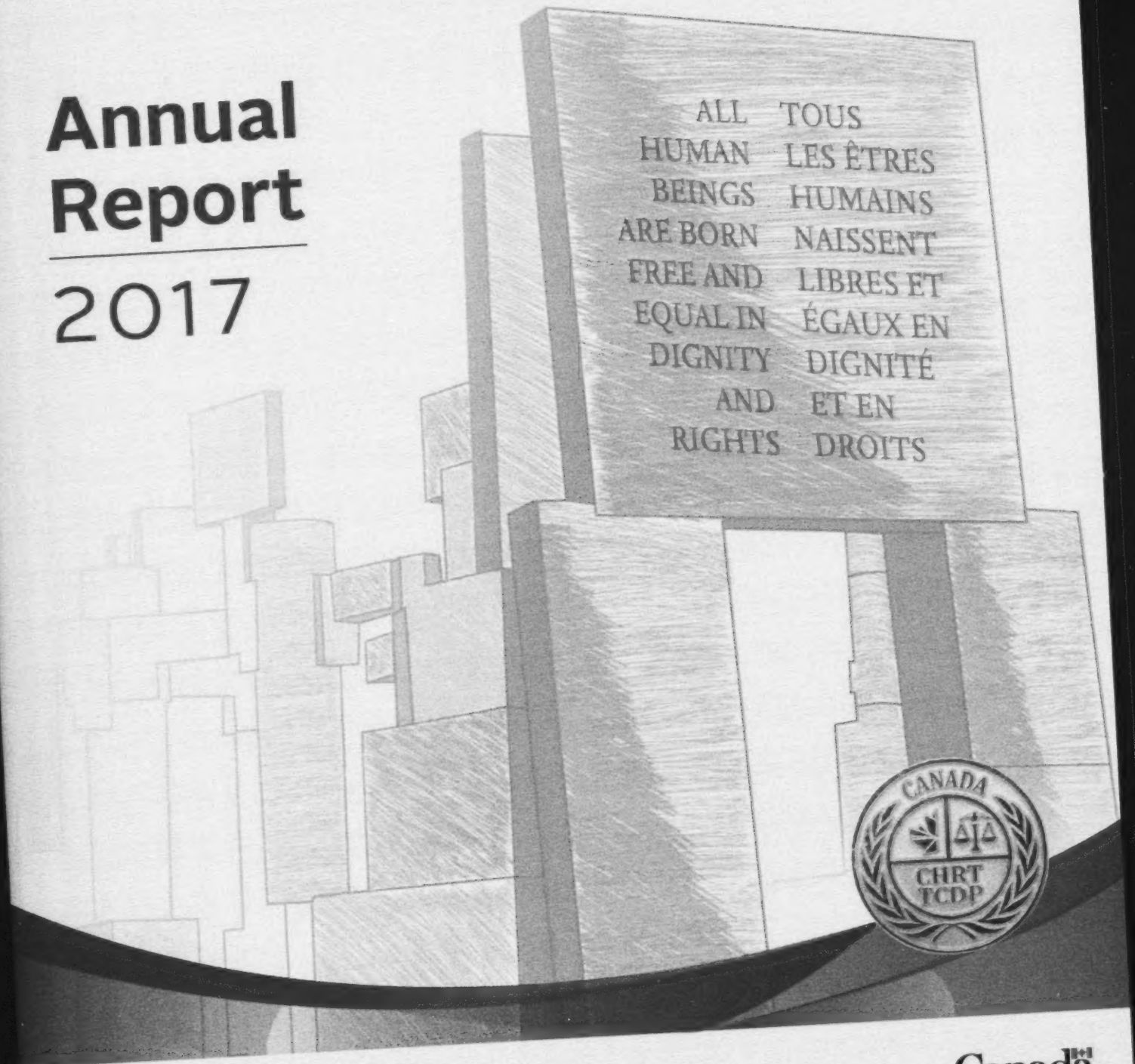
CANADIAN HUMAN RIGHTS TRIBUNAL

Annual Report 2017



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CHAIRPERSON'S MESSAGE

As the Chairperson of the Canadian Human Rights Tribunal, I have the honour to present this 2017 Annual Report to Parliament and to all Canadians.

The year 2017 marked the 150th anniversary of Confederation, the 35th anniversary of the *Charter of Rights and Freedoms*, and the 40th anniversary of the *Canadian Human Rights Act*. This is the 20th Annual Report of the CHRT since it fully separated from the Canadian Human Rights Commission in 1998 and became an independent institution.

Canadians can be proud of our human rights record, and generally we are well respected around the world. We do not have a perfect system, but Parliament has remained vigilant and has updated the Act periodically over the years to reflect the changing world of human rights as it has evolved since 1977. For example, last year Parliament added two new grounds of prohibited discrimination to the Act: gender identity and expression; and genetic characteristics.

In 2017, the Tribunal continued to be responsive to an increasingly complex array of cases before us. The Tribunal held 137 case management conference calls to support parties in moving forward to the hearing stage and 42 in-person mediation sessions (34 of which resulted in settlement, reflecting an 81% success rate). We held 86 hearing days and released 8 decisions. In total, we closed 157 complaints in 2017, significantly reducing the total number in our caseload from 315 down to 225. With the addition of three full-time Members at national headquarters, it is my sincere hope that we can move cases, particularly those that go to hearing, through the process more quickly. While I remain confident in our ability to continue to provide access to justice, my message this year will highlight the existence of systemic problems that continue to challenge our ability to get through hearings and render decisions expeditiously.

The mandate of the Canadian Human Rights Tribunal is set out in the *Canadian Human Rights Act*. We are an adjudicative body that hears complaints of discrimination governed by the laws enacted by Parliament and subject to interpretations of those laws issued by superior courts. Administrative tribunals like the CHRT were created to provide access to justice that is expedient, timely, accessible and administered by subject experts.

If one were to look at the three previous Annual Reports since I became Chairperson, one would notice that, each year, we consistently issue more interim rulings than final decisions. The common reasons interim motions are brought are: to amend complaints; to add new allegations of discrimination or retaliation; to add parties; to obtain interested party status; or, to compel further disclosure of documents. In accordance with the Act, we

afford all parties a full and ample opportunity to make representations before us, but doing so comes with a cost. Giving all parties the opportunity to make submissions in writing adds many weeks to the process. It takes substantial Member and Tribunal Secretariat time to issue interim rulings. Often motions are brought by parties close to previously set hearing dates, resulting in cancelled travel and venue rental charges. Most importantly, this appears to be a growing trend that has added significantly to the time it takes to get from complaint referral to the first day of hearing, which today averages 22 months.

In the *2001 Annual Report of the CHRT*, there was a table of metrics, showing the evolution of the Tribunal's ability to discharge its duties in a timely manner. The table shows that in 1995, the average total time it took from receipt of complaint, to holding the hearing and releasing the decision, was 64 weeks. By 2001, that timeframe had been reduced to an average of 38 weeks. This was an improvement in which the Tribunal took pride. Two decades later, our average timeframe for the same work is now 175 weeks. While the increasing frequency of interim motions is certainly one reason, there are other systemic challenges that make these increased delays inevitable.

The Government of Canada was aware of concerns about the human rights process two decades ago. For this reason, it established the Canadian Human Rights Act Review Panel, which was chaired by former Supreme Court Justice, the Honourable Gérard La Forest. After careful study and consultations with numerous stakeholders, the Review Panel delivered its report in June of 2000. The *Report of the Canadian Human Rights Act Review Panel* (known as the *La Forest Report*) included detailed recommendations for a comprehensive overhaul to the complaints processing system. Consequently, my predecessors believed major changes to the scheme would be imminent. In fact, the Tribunal's *2003 Annual Report* to Parliament noted that it had already been three years since the *La Forest Report* and nothing had been done. It is now 15 years later, and the same statutory scheme that gave rise to roughly 160 recommendations still remains in effect.

“

The *Report of the Canadian Human Rights Act Review Panel* (known as the *La Forest Report*) included detailed recommendations for a comprehensive overhaul to the complaints processing system... Which recommendations most urgently merit implementation?

”

There is no easy explanation for the steady increase in delays over the last 18 years, as it appears there is a combination of factors involved. One factor originated in 2003, when the Commission decided that it would not fully participate in all complaints forwarded to the Tribunal. This was a significant departure from past practice, whereby complainants (and some respondents)

were indirect beneficiaries of the Commission's active advocacy. The result today is that the Commission appears before the Tribunal in only about 17% of the hearings held.

The 2011 decision of the Supreme Court of Canada in *Canadian Human Rights Commission and Mowat v. Canada (Attorney General)*, 2011 SCC 53, was another turning point for the Tribunal. Up until this decision, the Tribunal had interpreted s. 53 of the Act as allowing us to compensate a complainant for his or her legal expenses as part of our remedial orders. Once the *Mowat* decision clarified our inability to make such awards, the representation of complainants by legal counsel dropped significantly. Interestingly, in 2017, 49% of our complainants had legal counsel. This was a big improvement from previous years, as in 2016 only 21% had legal counsel. Nevertheless, the very large number of self-represented parties before us remains an obvious factor contributing to the delays in our processing of complaints.

Parliament set up the CHRT to be a quasi-judicial tribunal applying a quasi-constitutional statute, placing it at the more rigorous and complex end of the spectrum of administrative tribunals. Yet at the same time, s. 49.9(1) of the Act requires us to conduct our proceedings informally and expeditiously. It is the often conflicting nature of these two objectives that requires a delicate balancing act from the Tribunal. However, if factors beyond our control tip the scales, we should not be surprised if the objectives of informality and expeditiousness are more difficult to meet.

Is it time to dust off our copies of the *La Forest Report* and take a hard look at it again? Which recommendations most urgently merit implementation? Is it time to consider an abbreviated investigation and referral process? Is it time to consider an Ontario-style legal aid clinic to assist all parties in our process? Is it time to empower Tribunal Members with the authority to contain the scope and the length of the matters before us? Should the Tribunal have the authority to award costs against a party who deliberately delays the proceedings or engages in misconduct during the hearing?

Two decades ago, the Supreme Court of Canada considered a widely publicized human rights case from British Columbia. A former B.C. Cabinet Minister accused of sexual harassment sought a stay of the proceedings because of the delay in the process and the resulting loss of his opportunity to defend his reputation in a timely manner. Ultimately, the majority in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, did not find the delay in that case to be an infringement of Mr. Blencoe's *Charter* rights. Unfortunately, the length of delays that Mr. Blencoe complained of would seem short today, even for the routine cases before us. For this reason, the following comment from the *Blencoe* decision rings truer today than it may ever have:

> *Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians.*

Original signed by
David L. Thomas,
Chairperson

WHAT WE DO

The Canadian Human Rights Tribunal is a quasi-judicial body that inquires into complaints of discrimination referred to it by the Canadian Human Rights Commission and decides whether the conduct alleged in the complaint is a discriminatory practice within the meaning of the *Canadian Human Rights Act*. The Tribunal can also review directions and assessments made under the *Employment Equity Act*.

The Tribunal operates pursuant to the *Canadian Human Rights Act*, which aims to give effect to the principle that all individuals should have an equal opportunity to live their lives unhindered by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. The Act prohibits certain discriminatory practices with a view to protecting individuals in employment, and in the provision of goods, services, facilities, and in leasing commercial or residential premises.

Like a court, the Tribunal must be—and must be seen to be—impartial. It renders decisions that are subject to review by the Federal Court at the request of any of the parties. However, the Tribunal provides a less formal setting than a court, where parties can present their case without strictly adhering to complex rules of evidence and procedure. The Tribunal also offers mediation services where parties have the opportunity to attempt to settle their dispute with the assistance of a Tribunal Member acting as a mediator.

> “Like a court, the Tribunal must be—and must be seen to be—impartial.”

The Act applies to federally regulated employers and service providers, including: federal government departments and agencies; federal Crown corporations; chartered banks; airlines; shipping and inter-provincial trucking companies; telecommunications and broadcasting organizations; and, First Nations governments.

HOW THE TRIBUNAL WORKS

Tribunal Members conduct mediations, engage in case management, preside over hearings, issue rulings and render decisions. Parties to a complaint include the complainant, the respondent, the Commission, and, at the discretion of the Tribunal, any other interested parties.

MEDIATION

Parties to proceedings before the Tribunal have the option of trying to address their differences through voluntary and confidential mediation. The goal of the mediation is to try to reach a solution to the dispute between the complainant and the respondent in an informal environment. If an agreement is reached at mediation, there will be no hearing.

The mediator is a neutral and impartial Member of the Tribunal with expertise in human rights matters, whose role is to assist the parties to a complaint in resolving their differences through the negotiation of a settlement agreement. The mediator is there to facilitate discussions between the parties and ensure that they occur in an atmosphere of good faith, courtesy and respect. The mediator has no power to impose a solution or agreement.

CASE MANAGEMENT

Before proceeding to a hearing, Members engage in case management to resolve a variety of preliminary issues. Case management conference calls with all parties are often used as an expedient way to guide parties, resolve disclosure issues, explore agreed statements of facts and to settle any other preliminary matters, such as hearing dates and venue. The calls often establish the commitment of the parties to abide by their hearing schedule. Case management aims to ensure a fair approach to the inquiry process and to minimize missed deadlines, requests for adjournments on hearing days, and disagreements between parties about the issues being heard.

HEARING

A hearing is held in a court-like setting where the parties to the complaint are given the opportunity to present their witnesses' testimony, other evidence and argument to the Tribunal. The objective of the hearing is to allow the Tribunal to hear the merits of the case directly so it can determine on a balance of probabilities, whether or not discrimination has occurred. At the hearing the parties may also present evidence and submissions on the appropriate remedy to be ordered, in the event the complaint is substantiated. The length of the hearing depends on such factors as complexity of the case, the number of witnesses and the volume of documentary evidence.

HOW THE TRIBUNAL WORKS

RULINGS

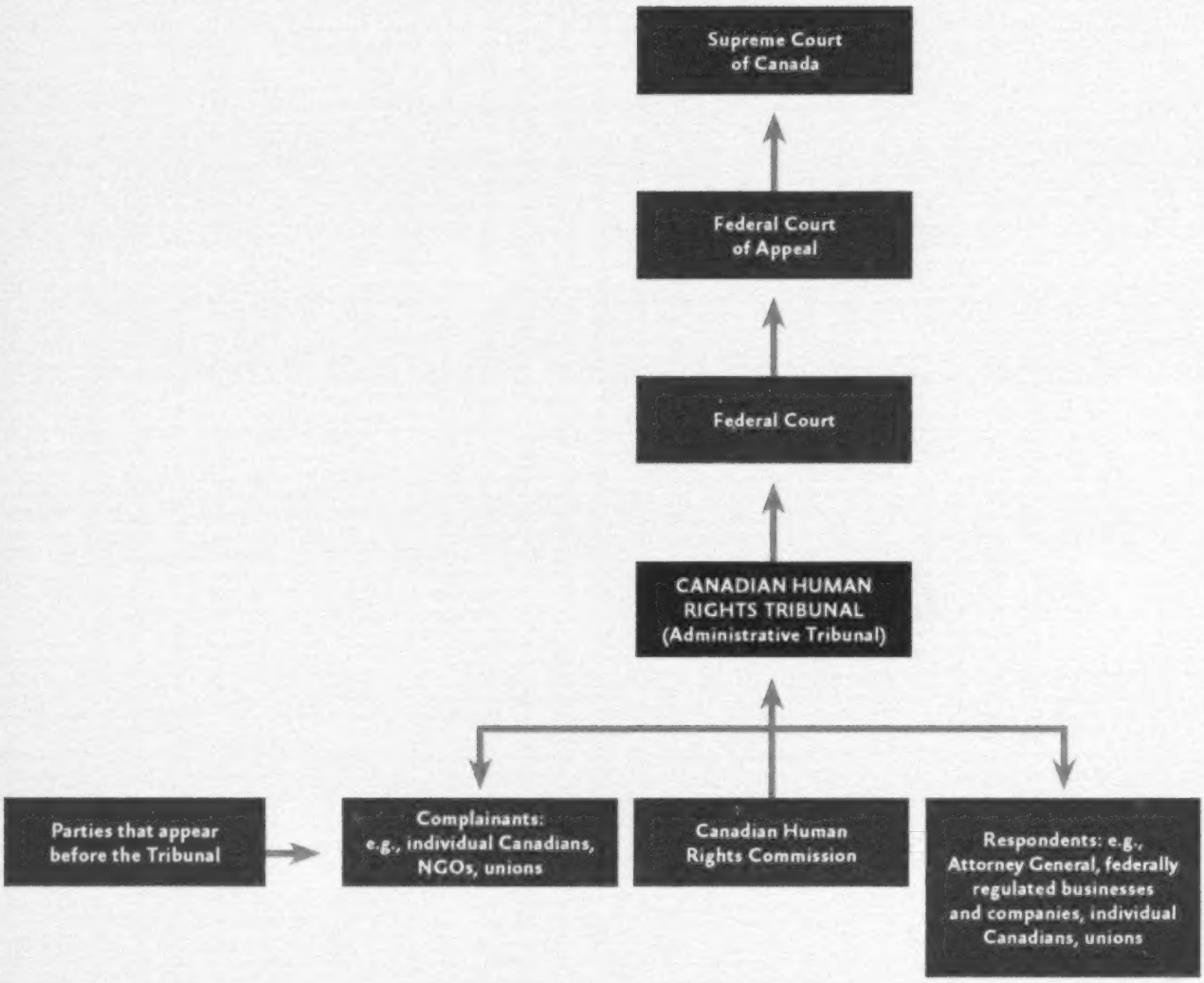
All sets of adjudicative reasons issued by the Tribunal that do not qualify as decisions (i.e., they do not answer the question of whether a discriminatory practice occurred) are classified as rulings. Rulings are usually issued in response to a preliminary motion raised by one of the parties before the hearing. For example, a ruling would be issued where a complaint is dismissed for lack of jurisdiction, abuse of process, delay, irreparable breach of fairness, or where the issue before the Tribunal is a motion for some type of procedural or evidentiary order (e.g., disclosure of documents, etc.).

DECISIONS

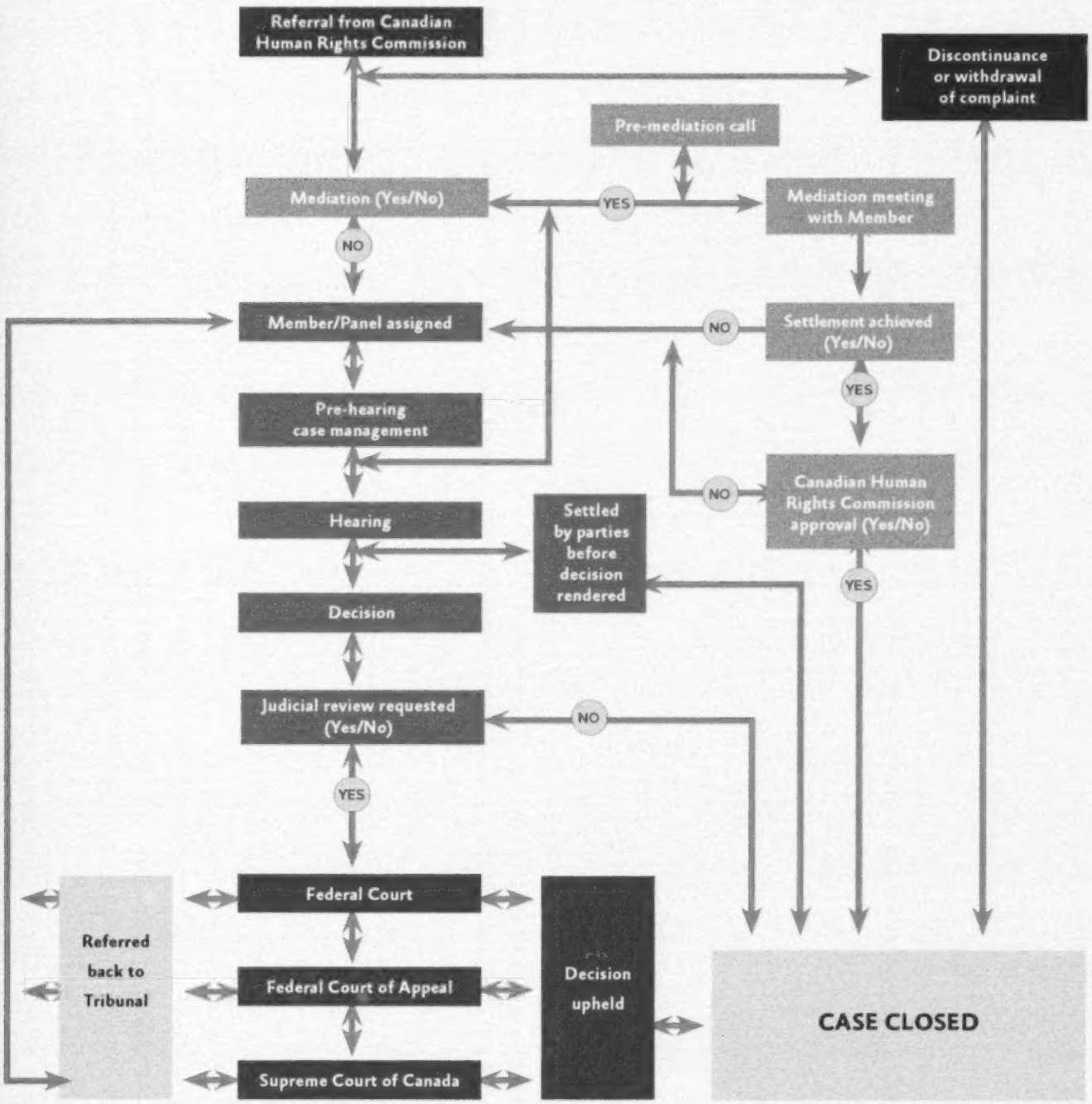
For the purpose of this report, a decision is defined as a set of adjudicative reasons issued by a Member or Panel of the Tribunal following a hearing, which relate to and ultimately answer the question of whether a discriminatory practice occurred in a given case. If a complaint is substantiated, the decision may also order a remedy to rectify the discrimination, and will provide reasons in support of the order.

> “Case management conference calls with all parties are often used as an expedient way to guide parties, resolve disclosure issues, explore agreed statements of facts and to settle any other preliminary matters.”

PARTIES BEFORE THE TRIBUNAL AND AVENUES OF JUDICIAL REVIEW AND APPEAL


Supreme Court of Canada
Federal Court of Appeal
Federal Court
CANADIAN HUMAN RIGHTS TRIBUNAL (Administrative Tribunal)
Parties that appear before the Tribunal
Complainants: e.g., individual Canadians, NGOs, unions
Canadian Human Rights Commission
Respondents: e.g., Attorney General, federally regulated businesses and companies, individual Canadians, unions

TRIBUNAL INQUIRY PROCESS
AND JUDICIAL REVIEW



TRIBUNAL CASELOAD
(JANUARY 1 – DECEMBER 31, 2017)

CASELOAD

The Tribunal started the year with 315 complaints. After closing 157 complaints and receiving a total of 67 new complaints referred by the Commission, the year ended with 225 active complaints.

CASELOAD JANUARY 1 – DECEMBER 31, 2017	
Active caseload as of January 1	315
Complaints closed	157
New complaints referred by the Commission	67
Active caseload as of December 31	225

Of the 157 complaints that were closed, 1 ruling dealt with 94 complaints that were treated as a cluster based on similar issues. Thirty-four (34) complaints were settled at mediation; 14 were settled between the parties; 3 complaints were withdrawn; 8 decisions were rendered; 1 decision upheld by higher courts dealt with 3 complaints; and 1 other Federal Court decision quashed the Commission's decision to refer a complaint.

CLOSED COMPLAINTS	
Ruling	94
Settled at mediation	34
Settled between the parties	14
Complaint withdrawn	3
Decision rendered	8
Decision upheld by higher courts	3
Other*	1
TOTAL	157

* Other – FC quashed CHRC decision to refer

VOLUNTARY MEDIATIONS

The Tribunal continued to offer voluntary mediation as an alternative dispute mechanism. Thirteen (13) pre-mediation conference calls were held with the parties to clarify issues and ensure shared understanding of the procedures. Forty-two (42) mediations were held in person, 34 (or 81 %) of which were settled at mediation.

MEDIATIONS JANUARY 1 – DECEMBER 31, 2017		
Pre-mediation conference calls	Held in person	Settled at mediation
13	42	34 (81%)

ADJUDICATION

The Tribunal held 137 case management conference calls and 86 hearing days. By year-end, 30 rulings, and 8 decisions were released.

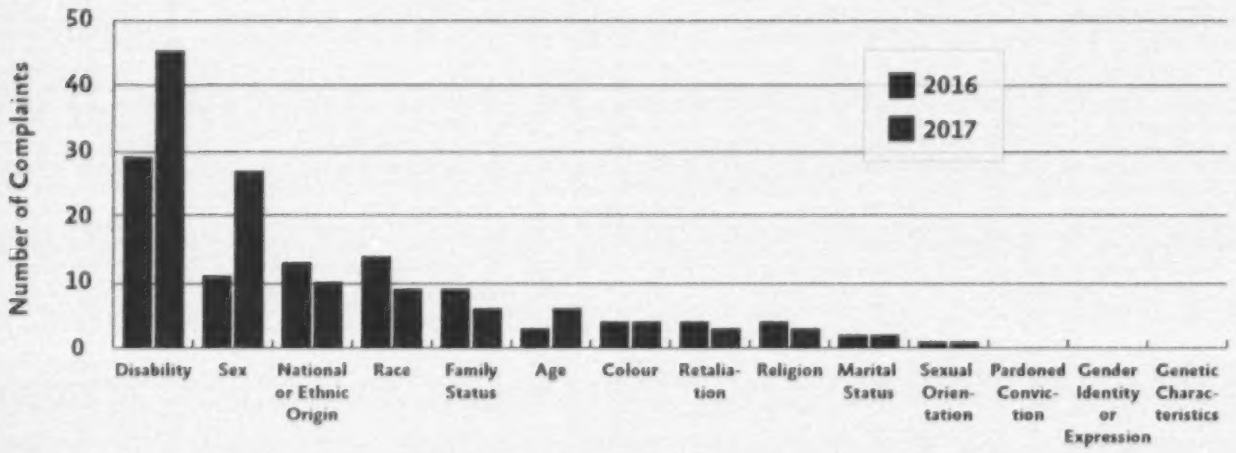
ADJUDICATION JANUARY 1 – DECEMBER 31, 2017			
Case management conference calls	Hearing days	Rulings	Decisions
137	86	30	8

COMPLAINTS BY PROHIBITED GROUNDS OF DISCRIMINATION

A comparison between 2016 and 2017 shows that complaints related to disability have increased from 29 to 45 and remain as the most prevalent ground of discrimination. Complaints based on sex have increased from 11 to 27, those based on national or ethnic origin decreased somewhat from 13 to 10, and those based on race decreased from 14 to 9. Complaints based on family status decreased from 9 to 6; those based on age doubled from 3 to 6. Complaints based on colour remain steady at 4, while those based on retaliation and religion each went from 4 to 3. Complaints based on marital status remain the same at 2, and those based on sexual orientation remains at 1. No complaints were referred on the ground of conviction for which a pardon has been granted, gender identity or expression, or genetic characteristics.

It should be noted that a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds. While retaliation is not a prohibited ground of discrimination, complaints alleging retaliation under s. 14.1 of the Act need not invoke a prohibited ground, thus they form a separate category of complaint.

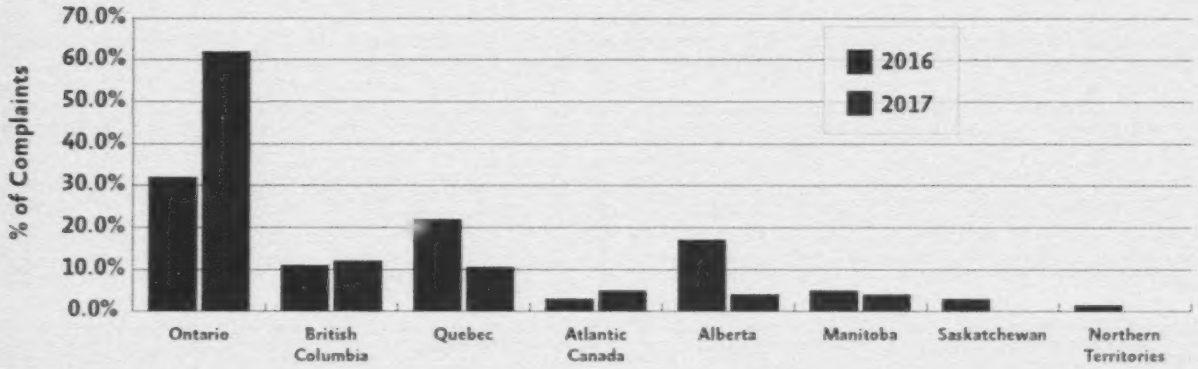
COMPLAINTS RECEIVED 2016 AND 2017 BY PROHIBITED GROUNDS OF DISCRIMINATION



COMPLAINTS BY PROVINCE

The highest proportion of complaints received continued to be from Ontario and British Columbia. A comparison between 2016 and 2017 shows that complaints from Ontario doubled from 32.7% to 62.7%; those from British Columbia went up slightly from 11.5% to 11.9%. Complaints from Quebec went down from 23.1% to 10.4%; those from Atlantic Canada nearly doubled from 3.8% to 6.0%. Complaints from Alberta went down significantly from 17.3% to 4.5%; those from Manitoba were slightly lower from 5.8% to 4.5%. Complaints from Saskatchewan went from 3.8% to 0.0%; and those from Northern Territories went from 1.9% to 0.0%.

COMPLAINTS RECEIVED IN 2016 AND 2017 BY PROVINCE



COMPLAINTS BY RESPONDENT TYPE

Out of the total 67 complaints received in 2107, the following respondents were named from highest to lowest: The Federal Government (25), First Nations Government (8), Telecommunications (6), Airline (5), Rail (5), Transportation (5), Financial Industry (5), Crown Corporation (3), Courier (2), Other (2), Individual (1).

NEW COMPLAINTS RECEIVED IN 2017 BY RESPONDENT TYPE

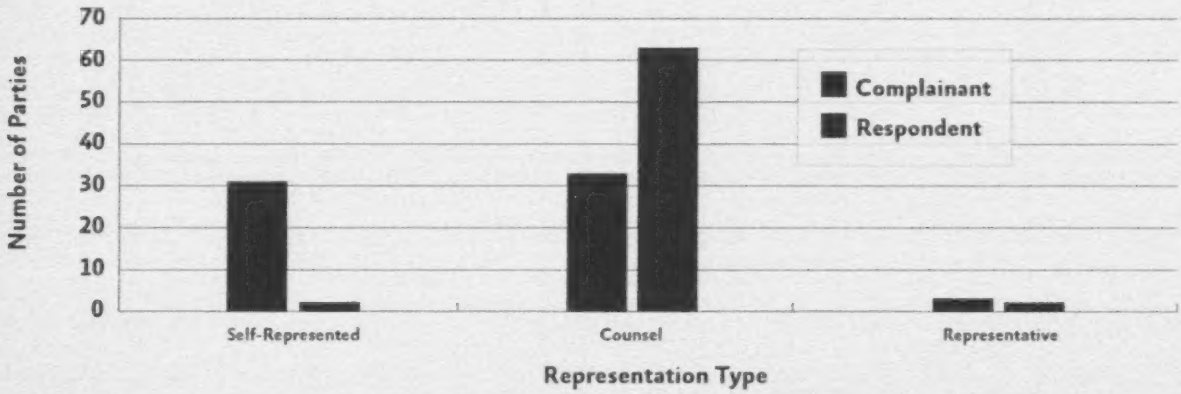
RESPONDENTS	NUMBER
Federal Government	25
First Nations Government	8
Telecommunications	6
Airline	5
Rail	5
Transportation	5
Financial Industry	5
Crown Corporation	3
Courier	2
Other	2
Individual	1
TOTAL	67

REPRESENTATION OF PARTIES

As in previous years, the number of self-represented complainants remains high (31) compared to self-represented respondents (2). The number of complainants represented by counsel (33) remained low compared to respondents represented by counsel (63). However, when compared to last year, there is an increase in representation of complainants by counsel from 21.15% in 2016 to 49.25% in 2017.

The number of complainants represented by non-lawyers (3) is almost equal to respondents represented by non-lawyers (2). It must be noted that a number of complaints are still in the early phase of the inquiry, and the type of representative may change by year-end.

REPRESENTATION OF PARTIES – COMPLAINTS RECEIVED IN 2017



CARRIED TO NEXT REPORTING YEAR

A total of 225 active complaints were carried over to January 1, 2018, where 48 remained in case management, 27 were in mediation, 5 were settled but were awaiting the Commission's approval, 8 were in active hearing, and 18 were awaiting rulings or decisions.

Clusters of 92 complaints are awaiting a ruling on a motion, and 13 other complaints are being held in abeyance pending a superior court's final determination of a similar matter. Four (4) files are on hold pending the parties' response and 10 have been adjourned *sine die*.

ACTIVE COMPLAINTS CARRIED AS OF JANUARY 1, 2018

STATUS	NUMBER
Case management	48
Mediation	27
CHRC review of settlement pending	5
Hearing	8
Ruling/Decision pending	18
Ruling pending on complaint cluster	92
In abeyance pending court's final determination of a similar matter	13
Files on hold pending parties' response	4
Adjourned *sine die*	10
TOTAL	225

SIGNIFICANT TRIBUNAL DECISIONS AND RULINGS

The following case summaries provide information about some Tribunal decisions that were particularly significant in their impact.

1. *MILLS V. BELL MOBILITY INC.*, 2017 CHRT 1

Ms. Mills alleged that Bell Mobility Inc. discriminated against her on the grounds of her physical and cognitive disabilities, pursuant to s. 5 of the *Canadian Human Rights Act*. She claimed Bell refused to provide her with same-day activation service for a new postpaid cellular phone, unless she appeared in person to be visually identified at one of Bell's retail stores. She wanted Bell to change its policy to allow disabled people, who cannot attend a store in person and need same-day cellular phone activation, to be able to obtain that service like other able-bodied Canadians.

As a result of a stroke, seizures and chemotherapy, Ms. Mills was unable to walk on her own and had significant cognitive and immune system deficiencies. She was partially paralyzed for a time and could not speak properly. As well, she was unable to focus or concentrate, and had orders from her doctor not to leave her home except in emergencies.

Ms. Mills needed a new cellular phone. She made arrangements for her son, who lived outside of the country, to go to a store to pick up a new phone on her behalf on one of his planned visits. Ms. Mills could not go safely to a store herself, given her physical and health restrictions. She needed her son to program the phone for her, since she could not do so given her cognitive deficiencies at the time.

Ms. Mills' son tried to make arrangements to buy and pick up a new cell phone for his mother, by bringing her identification to a retail store, but Bell had a policy requiring in-person attendance at the store for same-day activation. Bell representatives were fully advised about Ms. Mill's physical and mental condition, and inability to attend in person due to her health and disabilities. Her son offered to bring in all required identification, and to put Ms. Mills on the phone to verify that she was willing to have her son act for her. He further offered to bring in a valid Power of Attorney. None of these offers were acceptable to Bell. In the end, the only way for Ms. Mills to purchase a phone on a postpaid basis and have it activated on the same day was to go to the store in person, which she did with great difficulty and at significant danger to her health.

Bell explained that it is a target for individuals seeking to commit identity theft fraud, who profit by activating mobile devices and plans in the name of other people. This occurs thousands of times each year, resulting in losses of millions of dollars annually. In order to prevent fraud and to protect members of the public from identity theft, Bell had put in place retail fraud policies in its Retail Activation Standards, including requiring that any person activating a new cellular phone must appear in person, show government photo identification, and pass a credit check. Bell representatives were trained to not deviate from these policies, even in cases involving disabled people like Ms. Mills.

Bell argued that it had alternative measures that would have provided the same level of service to Ms. Mills. For example, Bell did not require photo identification for orders that were made over the phone or online,

because the phones are shipped to the address on the credit card. However, an individual choosing to place an order over the phone or online would then have to wait several days until their new phone was delivered—an option that Ms. Mills could not take advantage of since she needed to have the phone activated while her son was still in town. In addition, Bell noted that same-day activation would have been available to Ms. Mills if her son had prepaid the entire cost of the phone, as well as a certain amount of usage, or if he had activated the phone on a postpaid basis in his name, in which case he could have later transferred the account and device to Ms. Mills. However, Ms. Mills submitted that these options imposed a burden on disabled persons who cannot attend in store—a burden that is not imposed on other customers.

The Tribunal found that Bell had adversely differentiated against Ms. Mills in the provision of a service within the meaning of s. 5 of the Act. The Tribunal further found that Bell had adopted its Retail Activation Standard rule in good faith, in the belief that it was necessary for the purpose of preventing identity fraud, and that it was rationally connected to the prevention of fraud. However, the Tribunal found that Bell had not shown that accommodating the needs of individuals like Ms. Mills would impose an undue hardship on Bell pursuant to ss. 15(1)(g) and 15(2) of the Act.

The Tribunal found that Bell failed to produce any evidence establishing that it had assessed the cost or feasibility of any measures that could accommodate persons like Ms. Mills, and whether those measures would result in undue hardship. For example, Ms. Mills and the Canadian Human Rights Commission suggested accommodative measures such as using technologies like Skype or FaceTime with disabled customers, training in-store sales representatives to take identification from representatives of disabled individuals by way of Power of Attorney, or same-day home courier service for phone and online orders in larger centres. While Bell believed it had in place sufficient alternatives for persons unable to attend in store, the Tribunal concluded that these alternatives did not provide Ms. Mills with the same level of service as that offered to the rest of Bell's customers, and that Bell had wrongly characterized the accommodative measures proposed by Ms. Mills as mere personal preferences.

The Tribunal gave Bell six months to modify its Retail Activation Standards to allow disabled individuals who are unable to attend in store to purchase a postpaid cellular phone with same-day activation. The Tribunal further ordered Bell to provide training to employees involved in the development of the Retail Activation Standards. The training was to cover the purpose of the Act, the human rights obligations it gives rise to, and the consequential modifications to the Retail Activation Standards. Finally, the Tribunal ordered Bell to pay Ms. Mills $10,000 as compensation for pain and suffering, noting that such compensation is limited to pain and suffering arising from the discriminatory practice, rather than from the litigation of the complaint under the Act. Though it had found the complaint to be substantiated, the Tribunal described Bell as a generally "socially responsible" company that cares about its customers, and declined to order special compensation for wilful or reckless discrimination.

RESULTS FOR CANADIANS

Under s. 2 of the *Canadian Human Rights Act*, disabled individuals should have an opportunity equal with all other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices. This decision reinforces that the advancement of these principles may require that positive steps be

taken to ensure that disadvantaged groups benefit equally from services offered to the public, rather than merely treating everyone the same. Further, the decision highlights the need for service-providers to ensure that they have considered a wide range of accommodative options, and to be able to demonstrate that they have done so.

2. *O'BOMSAWIN V. ABENAKIS OF ODANAK COUNCIL*, 2017 CHRT 4

Ms. O'Bomsawin alleged that she was discriminated against on the ground of family status in a hiring process. She claimed she had been denied employment at the Odanak Health Centre because she was the daughter of the Health Centre's Director.

Over a number of years, Ms. O'Bomsawin had held three different contracts with the Odanak Health Centre, located on the Odanak Reserve of the Abenaki First Nation. In 2012, she applied for a fourth contract as a project manager. Following the closing date of the job competition, the Abenakis of Odanak Council oversaw the candidate assessment process. The Health Centre Director, who was also Ms. O'Bomsawin's father, did not sit on the selection committee. By the time that interviews took place, only Ms. O'Bomsawin and one other candidate remained in the competition.

The selection committee members used an evaluation grid to carry out interviews, which set out a number of criteria to be assessed, each with a corresponding number of points, for a total possible score of 100 points. Despite Ms. O'Bomsawin receiving a higher overall score from both members of the selection committee, the committee recommended to the Council that the other candidate be hired.

After being informed of the Council's decision to hire the other candidate, Ms. O'Bomsawin requested a meeting with the members of the selection committee. At the meeting, Ms. O'Bomsawin was told that she had previously received three contracts without doing an interview, and that this had been the subject of much discussion in the community.

In its decision, the Tribunal noted that Ms. O'Bomsawin had the required qualifications for the job—she had a university degree, experience in project management, and knowledge of the program as a result of having previously worked at the Health Centre. In fact, at the hearing, one of the members of the selection committee acknowledged that Ms. O'Bomsawin was more qualified than the other candidate. Further, there had been no complaints about Ms. O'Bomsawin's previous work for the Health Centre.

The Council tried to demonstrate that its actions were not discriminatory and that the hiring of another candidate was based on the candidate's skills. The selection committee members claimed that the chosen candidate was more motivated for the job, and that this factor was determinative. The Tribunal noted that while motivation was one of the criteria on the evaluation grid, it was worth only 10 points out of 100. The Council further argued that that the ability to form and maintain interpersonal relationships was a *bona fide* occupational requirement for the job, and that Ms. O'Bomsawin had not demonstrated that she had this ability. However, the Council did not provide any evidence to establish this *bona fide* justification.

On the other hand, it was repeatedly mentioned throughout the hearing that there had been much talk in the community that Ms. O'Bomsawin had obtained her previous contracts because she was the daughter of the Health Centre's Director. On the whole, the Tribunal held that the respondent's explanation was not convincing, and was merely a pretext for having discriminated against Ms. O'Bomsawin on the prohibited ground of family status.

Having found the complaint substantiated, the Tribunal ordered the Council to pay compensation to Ms. O'Bomsawin for lost wages, pain and suffering, and wilful and reckless discrimination. In assessing compensation for lost wages, the Tribunal noted that Ms. O'Bomsawin had mitigated her losses because she had been able to get another job. In arriving at a final amount, the Tribunal applied what it believed would have been a reasonable hourly rate of pay, in light of Ms. O'Bomsawin's previous work for the Health Centre. The Tribunal also considered that work performed on a reserve is not taxable. It awarded $10,000 for pain and suffering, and $7,500 for wilful and reckless conduct, observing that the Council's behaviour was "devoid of caution," and that it "...clearly seemed not to care about the consequences."

RESULTS FOR CANADIANS

This decision reiterates that it is not necessary to show that discrimination is the sole basis for the acts complained of in order for the complaint to be substantiated. It is sufficient for a prohibited ground of discrimination to have been a contributing factor in the employer's decision. The decision is also an example of the Tribunal engaging in a thoughtful assessment of compensation, including the various and sometimes complicated factors that can and cannot affect a determination of lost wages.

3. *TEMPLE V. HORIZON INTERNATIONAL DISTRIBUTORS*, 2017 CHRT 30

Ms. Temple was the only female owner-operator at Horizon International Distributors, a small Manitoba trucking company that engaged in activities across Canada. Horizon employed two types of truck operators to deliver its freight: truck operators who drove the trucks that belonged to the company and who were employees ("operator-employees"), and truck operators who owned their own heavy goods vehicle and who were employed on a contractual basis ("owner-operators"). Ms. Temple alleged that Horizon discriminated against her on the basis of her sex and disability. She alleged that she suffered adverse differential treatment in the course of employment, and that the respondent refused to continue to employ her, contrary to s. 7 of the *Canadian Human Rights Act*.

In October 2014, another truck collided with Ms. Temple's truck while she was filling up at a gas station, injuring Ms. Temple's hand and damaging her truck. Ms. Temple was able to complete her delivery, but was unable to work again until December 2014. On December 14, 2014, Ms. Temple informed Horizon that she had an appointment for a CT scan on December 18. On December 17, Horizon told her she had to pick up a load on December 18. Ms. Temple reminded Horizon of her conflicting medical appointment, and further noted that her truck unexpectedly required further repairs. She was unable to pick up the load on December 18 as requested, and Horizon terminated her employment contract on the same day.

The Tribunal noted that a complainant has the burden of establishing, on the balance of probabilities, a *prima facie* case of discrimination. In this particular case, Ms. Temple had to establish, in accordance with s. 7 of the Act:

1. The presence of one or more prohibited grounds of discrimination under the Act (in this case, sex and disability);
2. That, in the course of employment, the respondent differentiated adversely in relation to her or refused to continue to employ her; and
3. That there was a connection between the prohibited grounds of discrimination and the adverse differential treatment in the course of employment or the refusal to continue to employ her.

In determining whether there was a connection between the adverse differential treatment and a prohibited ground, the Tribunal noted that there is no need to establish a causal connection; rather, it is sufficient to demonstrate that the prohibited ground was a factor. The respondent may demonstrate that the discrimination did not occur as alleged, or that the conduct was not discriminatory within the meaning of the Act. The respondent may also establish a defence under s. 15 of the Act.

In this case, Horizon did not rely on the exceptions set out in s. 15 of the Act to explain the alleged discriminatory practices. Thus the Tribunal focused solely on whether this was a *prima facie* case of discrimination. In reviewing the evidence, the Tribunal noted that the relationship between Ms. Temple and Horizon had deteriorated considerably over time.

After establishing that there was no dispute that Ms. Temple's injury could be considered a disability, the Tribunal went on to carefully consider a number of events that Ms. Temple presented as examples of adverse differential treatment. For example, Ms. Temple alleged that she had felt pressured to deliver and drive, even in situations where her truck had a mechanical problem, or when her driving hours risked violating statutory requirements. Ms. Temple also alleged that Horizon treated her differently than other owner-operators in regards to the management of certain expenses related to her truck.

In a number of instances, the Tribunal found that Ms. Temple had not adduced sufficient evidence to prove on the balance of probabilities that she had been subject to adverse differential treatment. That said, the Tribunal did find that Ms. Temple had suffered adverse differential treatment in certain instances, namely in regard to when she was forced to make deliveries or go on the road, in relation to the management of her debt to Horizon, and in the treatment of insurance claims related to her injury. However, the Tribunal concluded that Ms. Temple had not established a connection between these impugned actions and her sex and/or disability. The evidence tended to demonstrate that Horizon had other reasons to act as it did, and that the relationship between Horizon and Ms. Temple had deteriorated considerably over time. The Tribunal acknowledged that Ms. Temple felt pressure from Horizon, and feared being dismissed, which resulted in stress and anxiety in her work on a day-to-day basis. But the evidence revealed Ms. Temple required more supervision than certain other operators, and that there were misunderstandings and communication problems. This led to built-up frustrations on both sides. While these factors contributed to Ms. Temple's impression that Horizon differentiated adversely in relation to her, the Tribunal was unable to find any evidence to show that this treatment was related to either her sex or disability.

Ultimately, the Tribunal decided that Ms. Temple had not met the burden of establishing a *prima facie* case of discrimination or, more specifically, that the characteristics protected by the Act were a factor in the adverse impacts she experienced. The complaint was dismissed.

RESULTS FOR CANADIANS

This decision reiterated important aspects of the Supreme Court of Canada's decision in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39, namely that a *prima facie* case of discrimination must be established on the balance of probabilities, and that the use of the term *"prima facie"* should not be regarded as a relaxation of this standard of proof. In addition, the decision illustrates that even where an employer differentiates adversely in relation to an employee, such treatment does not always result in a finding of discrimination. The *Canadian Human Rights Act* requires proof of a connection with a prohibited ground.

Finally, this case demonstrated the Tribunal's commitment to conduct proceedings as expeditiously and informally as possible, while respecting the rules of natural justice, as required by s. 48.9(1) of the Act. The hearing took place in two locations in order to reduce the burden on the parties who were resident in different cities—Calgary and Winnipeg—and videoconferencing was utilized. The Tribunal was proactive in guiding the parties throughout the hearing, specifically in regard to managing documents and testimony. The Tribunal also ensured that the parties were able to follow and understand the hearing, even if they were not physically present.

4. *WADDLE V. CANADIAN PACIFIC RAILWAY & TEAMSTERS CANADA RAIL CONFERENCE*, 2017 CHRT 24

In this case, Mr. Waddle alleged that his employer, Canadian Pacific Railway (CP), and his union, Teamsters Canada Rail Conference, discriminated against him in the course of his employment on the grounds of disability and family status.

Mr. Waddle was employed as a locomotive engineer at CP's terminal in Lethbridge, Alberta (his "Home Terminal"). In this job, he drove trains from his Home Terminal to various other terminals in Southern Alberta ("Away Terminals"), and worked in unassigned service, which was a type of schedule in which he was required to be on-call and given two hours' notice of his start time. He would then be required to operate a train for up to 12 hours to an Away Terminal, where he would be allowed up to eight hours of rest time, after which he was on-call again waiting to begin the shift back to his Home Terminal.

While employed by CP, Mr. Waddle experienced a number of medical issues, including ongoing difficulty with his neck and spine, and arthritis in his knee. In addition, he experienced difficulties with sleeping and anxiety, while waiting to be called for a shift. As a result, Mr. Waddle was forced to report medically unfit for work on a number of occasions, and had reported to his physician that he had even fallen asleep on occasion while driving a train.

All parties agreed that Mr. Waddle's position as a locomotive engineer was "safety critical," which meant impaired performance due to a medical condition could result in a significant incident affecting the health and safety of employees, the public, property or the environment. Mr. Waddle sought out a sleep specialist, and asked the specialist to recommend he be given a locomotive engineer position in unassigned service, with a call-out window restricted from 5 a.m. to 5 p.m. The specialist did so, without being fully aware of Mr. Waddle's working conditions.

Canadian Pacific was unable to accommodate this request because the 5 a.m. to 5 p.m. call-out window could not be managed at Away Terminals as no other employees at Lethbridge used it. The Tribunal agreed with CP's evidence that such a schedule would have caused considerable expense to CP, and would have posed a health and safety risk to other CP employees. Other potential accommodations that were discussed and rejected for various reasons included: office work (Mr. Waddle could not read well), relocation (Mr. Waddle was unwilling), and other types of positions which would have required the displacement of more senior employees. Relocation was a particular issue in the accommodation process because there were positions in Calgary in which Mr. Waddle could have been accommodated. However, he was unwilling to relocate due to family obligations. The Tribunal noted that CP's Chief Medical Officer had described Mr. Waddle's case, with its multiple medical restrictions, as one of the most complicated in the workplace.

Canadian Pacific was able to provide Mr. Waddle with a schedule in which he worked three fixed shifts per week in assigned service, with the option to bid on additional

shifts. However, Mr. Waddle continued to prefer a 5 a.m. to 5 p.m. call-out window in unassigned service, and was not satisfied with having only three shifts per week. He argued that the refusal to allow him to work this schedule constituted discrimination against him in the course of employment on the grounds of disability and family status.

With respect to family status, the Tribunal found that Mr. Waddle had provided limited evidence as to the nature or extent of any disabilities his parents might have had, or as to any medical, social, homecare or other needs they might have had. He also failed to show that he had made efforts to obtain alternative care. Without this evidence, the Tribunal found that Mr. Waddle had not established that he had an eldercare obligation that engaged his legal responsibility. The Tribunal concluded that Mr. Waddle failed to prove on a balance of probabilities that he was discriminated against based on family status under s. 10 of the Act.

With respect to Mr. Waddle's disability, the Tribunal found that both CP and the Union had engaged in *prima facie* discrimination within the meaning of s. 7(b) of the Act as, due to his medical disability, the complainant was prevented from working as a locomotive engineer without restrictions.

The Tribunal went on to examine whether the respondents could demonstrate that the discriminatory action was justified as a *bona fide* occupational requirement. This entailed a determination of whether accommodating Mr. Waddle would impose undue hardship, considering health, safety and cost.

The Tribunal noted that this was not a case in which the employer had refused to make any attempts at accommodation. The issue was therefore whether the efforts made to find employment for Mr. Waddle—for which he was medically fit—amounted to reasonable accommodation. Where the employer proposes a reasonable accommodation, the complainant cannot insist on his or her preferred alternative accommodation.

Canadian Pacific had accommodated Mr. Waddle by giving him a position in assigned service with three fixed shifts per week, and the option to bid on additional shifts. The Tribunal found that this constituted reasonable accommodation as the evidence demonstrated that Mr. Waddle had experienced no loss of income, he was able to stay in his preferred position as a locomotive engineer in his preferred location of Lethbridge, and he was able to work within his medical restrictions. In making this determination, the Tribunal noted that to constitute a reasonable accommodation, the solution need not be perfect. Moreover, Mr. Waddle's preferred 5 a.m. to 5 p.m. call-out window was never a viable accommodation. In the Tribunal's view, requiring Mr. Waddle to accept a transfer to Calgary would also have constituted reasonable accommodation, given that he had been unable to establish a *prima facie* case of discrimination on the basis of family status.

The Tribunal noted that Mr. Waddle could not have worked his preferred schedule in unassigned service given the "safety critical" nature of the work. Such a schedule was inconsistent with the medical restrictions identified by the sleep specialist. The Tribunal further found that CP was not required to create office work or other bundled work for Mr. Waddle in order to provide extra shifts. The jurisprudence has established that employers do not have a make-work obligation to assign unproductive work in order to satisfy a duty to accommodate.

Given the finding that Mr. Waddle was fully accommodated by CP, no obligations of union participation were triggered. Nevertheless, the Tribunal spent some time reviewing the involvement of the Union in this case, and whether the Union should have

bumped a more senior employee to accommodate Mr. Waddle. The Union argued that their refusal to bump a more senior employee was motivated by a desire to protect the value of seniority. However, the evidence indicated that the Union's actions were guided by a biased view about Mr. Waddle's sleep disorder, namely, that it was not deserving of accommodation pursuant to which a more senior employee would be displaced. While they did not give rise to liability in the circumstances of this case, the Tribunal expressed concerns about the Union's actions.

The Tribunal also commented on Mr. Waddle's duty to facilitate accommodation. The Tribunal found Mr. Waddle had failed in his duty to facilitate accommodation in that he was reluctant to provide complete information to his sleep specialist, he had not provided ongoing and updated medical records to his employer, and he had failed to properly bid for shifts.

Ultimately, the Tribunal concluded that Mr. Waddle had established a *prima facie* case of discrimination, based on the ground of disability, against each of the respondents. However, the restrictions imposed on Mr. Waddle's employment had been based on a *bona fide* occupational requirement, and he had been fully accommodated at all relevant times to the point of undue hardship. The claim of discrimination on the ground of disability was therefore dismissed.

RESULTS FOR CANADIANS

This decision is notable as an instructive overview of the employer's duty to accommodate, as well as the employee's duty to facilitate accommodation. It serves as a reminder that reasonable accommodation does not require a perfect solution, nor does it require employers to create make-work projects. Finally, it underscores the need for claimants of family status discrimination to demonstrate the nature and extent of their obligation to provide care for relatives.

RULINGS ON MOTIONS AND OBJECTIONS

In addition to decisions, the full text of all written reasons in support of rulings rendered in 2017 on motions and objections can be found in the Decisions section of the Tribunal's website at **www.chrt-tcdp.gc.ca**.

TRIBUNAL ACTIVITIES

ANNUAL MEMBERS' MEETING – SEPTEMBER 2017

The Tribunal held a two-day Annual Meeting for its full- and part-time Members. The agenda featured Justice Harry Slade, Chairperson of the Specific Claims Tribunal Canada, as the keynote speaker on Legal Traditions and Customary Laws of First Nations. Legal developments and jurisprudence update were presented, common themes and challenges were shared, and service standards, caseload data and Registry processes were discussed.

OUTREACH

In 2017, the Tribunal's outreach centred primarily on efforts to identify opportunities that could potentially support self-represented parties before the Tribunal.

As part of his travel on scheduled mediations or hearings across the country, the Chairperson took the opportunity to meet with various law student communities to explore the possibility of coordinated *pro bono* assistance for parties who otherwise would not be able to afford any representation. The Chairperson's visits included: the student legal aid clinics at the University of Alberta and Dalhousie University; the 2017 National Training Conference of Pro Bono Students Canada in Toronto; and the law schools at both McGill University and Queens University.

Discussion of the same issue was held with the Canadian Human Rights Commission. There was agreement that, to the extent the law students may offer *pro bono* assistance to parties before the Tribunal, any training or guidance will not be provided by the Tribunal, but rather will be coordinated by the Commission.

NEW MEMBERS SELECTION PROCESS

A significant amount of time in 2017 was dedicated to the recruitment of new Members for the Tribunal under the Government of Canada's new Governor in Council appointments process, which emphasizes qualification, merit and transparency. After a Notice of Opportunity was posted in December of 2016, the selection committee sifted through the hundreds of applications received, and more than 160 applicants wrote a six-hour examination that was reviewed and graded internally. The process resulted in the re-appointment of two full-time Members, Gabriel Gaudreault and Kirsten Mercer, and the appointment of full-time Member Colleen Harrington, who was previously counsel with the Yukon Human Rights Commission. Our long-serving, full-time Member Sophie Marchildon retired from the CHRT at the end of 2017, although she continues working to finalize some of her cases. We thank Member Marchildon for her eight years of dedication and service to Canadians, and for the significant body of jurisprudence she leaves behind.

MEMBERS OF THE TRIBUNAL

The *Canadian Human Right Act* specifies that a maximum of 15 Members, including a Chairperson and a Vice-chairperson, may be appointed by the Governor in Council. At the time of publishing this report, the Tribunal has a total of 15 Members: Five full-time Members are based in the National Capital Region; five part-time Members are based across Canada; four Members whose appointments have expired, but who are concluding inquiries are based in Ontario; and one is in Nova Scotia. A selection process is underway to determine future appointments.

	FULL-TIME MEMBERS		
	NAME & TITLE	**APPOINTMENT DATE**	**END OF TERM**
1.	David Thomas, Chairperson	2014-09-02	2021-09-01
2.	Susheel Gupta, Vice-chairperson	2010-08-03	2018-08-02
3.	Gabriel Gaudreault	2017-01-30	2022-12-29
4.	Kirsten Mercer	2017-01-30	2021-12-29
5.	Colleen Harrington	2018-01-29	2022-01-28
	PART-TIME MEMBERS		
6.	Dena Bryan, Nova Scotia	2015-03-26	2020-03-25
7.	Olga Luftig, Ontario	2012-12-13	2020-12-12
8.	Alex G. Pannu, British Columbia	2015-06-18	2020-06-17
9.	Anie Perrault, Quebec	2015-04-30	2020-04-29
10.	George Ulyatt, Manitoba	2012-12-13	2020-12-12
	MEMBERS WHOSE APPOINTMENT HAS EXPIRED, BUT WHO ARE CONCLUDING AN INQUIRY THAT THEY HAVE BEGUN, WITH THE APPROVAL OF THE CHAIRPERSON, AS PER S. 48.2 (2) OF THE *CANADIAN HUMAN RIGHTS ACT*.		
1.	Matthew D. Garfield, Ontario	2006-09-15	2016-09-14
2.	Edward Lustig, Ontario	2008-02-17	2017-12-30
3.	Sophie Marchildon, Ontario	2010-05-31	2017-12-30
4.	Ronald Sydney Williams, Ontario	2013-06-06	2016-06-05
5.	Lisa Gallivan, Nova Scotia	2014-05-09	2017-05-08

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